IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

FIRST APPEAL No. 215 of 2002
With
CROSS OBJECTION No. 101 of 2002
In
FIRST APPEAL No. 215 of 2002

For Approval and Signature:

HONOURABLE MR.JUSTICE M.S.SHAH
and
HONOURABLE MR.JUSTICE AKIL KURESHI

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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ORIENTAL INSURANCE CO.LTD. - Appellant(s)
Versus
RANIBEN WD/O RAMJIBHAI BHURABHAI MAKWANA & 7 - Defendant(s)

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Appearance :
MR RAJNI H MEHTA for Appellant(s) : 1,
MR MEHUL S SHAH for Defendant(s) : 1,3 - 6.
MR SURESH M SHAH for Defendant(s) : 1,3 - 6.
NOTICE SERVED for Defendant(s) : 2,7 - 8.

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CORAM : HONOURABLE MR.JUSTICE M.S.SHAH

and

HONOURABLE MR.JUSTICE AKIL KURESHI

Date : 16 & 19/03/2007

ORAL JUDGMENT

(Per : HONOURABLE MR.JUSTICE M.S.SHAH)

This appeal by the insurer of one of the vehicles involved in the motor vehicle accident challenges the judgment and order dated 30th July 2001 passed by the Motor Accident Claims Tribunal, Kachchh-Bhuj in MACP No.354 of 1992 awarding compensation of Rs.18 lacs with proportionate costs and interest at the rate of 9 per cent per annum from the date of the claim petition to widow, children and brother of the deceased.

2. On 18th March 1992 Ramjibhai Bhurabhai Makwana, a Forest Officer in the services of the State Government and his friend Sumarbhai were travelling on a motor-cycle from Adesar to Bhachau on the Ahmedabad-Kandla National Highway. Ramjibhai was driving the motor-cycle and Sumarbhai was the pillion rider. When the motor-cycle reached near village Vondh, the chhakada rickshaw insured by the appellant Insurance Company came from the opposite direction and dashed against the motor-cycle. On account of the collision between the two vehicles, Ramjibhai, driver of the motor-cycle sustained serious injuries and died on the spot. The pillion rider also sustained serious injuries and died.

3. Widow, three minor daughters and minor son of the deceased and also the younger brother of the deceased filed the claim petition for compensation of Rs.15 lacs initially. Subsequently, by moving an amendment application vide application Ex.74, the claim was sought to be raised to Rs.30 lacs. The Tribunal granted the said application by order dated 19th July 2001.

4. The Tribunal held that the accident was caused by the sole negligence of the driver of the chhakada rickshaw insured by the appellant Insurance Company.

5. On the question of quantum of compensation, the claimants' case was that the deceased was a Forest Officer and he was getting monthly salary of Rs.2858/- prior to the accident and that in view of pay-revisions during the pendency of the claim petition, the deceased would have got substantially higher salary till the date of his superannuation in the year 2020. The gross amount likely to have been received by the deceased till the date of his retirement was estimated at Rs.36 lacs and odd amount. The Tribunal proceeded on the basis that the deceased was 28 years old and the multiplier 18 would be applicable. The Tribunal then proceeded to consider as to what would be the salary of the deceased 18 years after the date of the accident had the deceased survived and on that basis assessed the prospective annual income of the deceased at Rs.1,33,884/- in the years 2009-10. Applying the multiplier of 18, the Tribunal computed the earnings of the deceased at Rs.24,09,912/-. Deducting one-third amount therefrom as the personal expenses of the deceased, the Tribunal determined the compensation for loss of dependency benefit at Rs.16,06,608/-. The Tribunal also awarded various amounts under other heads and made an award for total compensation of Rs.18 lacs as per the following break-up:

Loss of dependency benefit	Rs.16,06,608
Bonus for 18 years at the rate of Rs.2419/-	Rs. 43,542
Gratuity	Rs. 1,15,000
Loss to the estate	Rs. 15,000
Loss of consortium	Rs. 15,000
Funeral expenses	Rs. 5,000
Total	Rs.18,00,150

The Tribunal passed the award for the said amount with proportionate costs and interest at the rate of 9 per cent and also directed the appellant Insurance Company to satisfy the award.

6. The appellant as insurer of the chhakada rickshaw is in appeal before us. Mr.R.H.Mehta, learned advocate for the appellant has challenged the judgment and award of the Tribunal both on the question of negligence and on the question of quantum of compensation.

Preliminary Contention – Maintainability of Appeal

7. Before we set out the contentions urged on behalf of the appellant Insurance Company on merits of the appeal, we may first deal with the preliminary contention raised by Mr.Mehul Suresh Shah for the original claimants that since the Tribunal had rejected the applications made by the appellant Insurance Company for permission under section 170 of the Motor Vehicles Act, 1988, this appeal challenging the findings of the Tribunal on negligence and quantum of compensation is not at all maintainable. Strong reliance is placed on the decisions of this Court in **Oriental Insurance Company Ltd v. Manjulaben Jayantibhai Patel**, 2003 (3) G.L.H.204 rendered by a Division Bench to which one of us was a party. Reliance is also placed on the decision of another Division Bench dated 22.12.2005 of this Court in First Appeal No.2107 of 2005 in support of the the above preliminary contention urged on behalf of the claimants who are respondents Nos.1 to 6 before us.

8. The record and proceedings of the claim petition reveal the following facts :-

8.1 The claim petition was filed before the Tribunal for compensation of Rs.15 lacs on 8th September, 1992. In response to the notice issued by the Tribunal, opponent No.1 – driver of the chhakada rickshaw was served, but did not appear before the Tribunal. Opponent No.2 (owner of the chhakada-rickshaw)

through advocate Mr.J.K.Thacker on 9th October, 1992 obtained permission of the Tribunal to appear for the owner and also filed an application praying for adjournment for filing written statement. The application was granted. Similarly, opponent No.3 insurance Company appeared through advocate Mr.Dholakia who also filed an application for adjournment for filing written statement. It appears that on three further occasions, applications for adjournments were made by the learned advocates for opponent Nos. 2 & 3 and thereafter on 11th February 1993, opponent No.3 Insurance Company (appellant herein) submitted its written statement at Ex.24. No written statement ever came to be filed by opponent No.2 – owner of the chhakada rickshaw.

8.2 On 14th February 2000, claimant No.6 was examined as the first witness of the claimants for producing the First Information Report, panchnama and driving licence, etc. having a bearing on the question of negligence and also other documents like, salary certificate and school leaving certificate having a bearing on the question of income of the deceased. After the said witness completed his examination in chief, a specific endorsement was made by the Tribunal as under:

> "Cross Examination: Opponent No.1 is absent, for opponent No.2 J.K.Thacker. No cross."

Mr.R.J.Dholakiya, learned advocate for opponent No.3 Insurance Company (appellant herein) cross-examined the said witness.

On the same day, Hajrabhai, widow of pillion rider Sumar Bhatti was also examined in the companion petition (consolidated with the claim petition giving rise to this appeal) and after examination-in-chief was over, the Tribunal made the following endorsement:

> "Cross-examination :- Opponent No.1-2 are absent
> Advocate Mr.Dholakiya for opponent No.3 cross-examined the witness"

Thus neither of the witnesses examined on behalf of the claimants of the two claim petitions was cross-examined by or on behalf of opponent Nos.1 & 2 i.e. driver and owner the chhakada rickshaw which was insured by the present appellant.

8.3 On 1st March 2000, the learned advocate for the appellant Insurance Company submitted application Ex.52 stating that the driver and owner of the vehicle were served, but were not effectively contesting the claim and were not properly participating in the proceedings and therefore the Insurance Company had reasonable apprehension that the said opponents were not interested in contesting the claim and/or had colluded with the claimants and hence permission was sought under section 170 of the Act for contesting the claim on merits.

The said application Ex.52 was rejected by the Tribunal with the following order:

> "Opponent No.2 is appearing through his advocate It is not survive (sic the application does not survive). Hence it is rejected."
>
> 1-3-2000

8.4 Thereafter on 1st March 2000 itself, Amirbhai Amadbhai Raja was examined at Ex.53 as an eye-witness mainly on the question of negligence stating that the motor-cycle being driven by the deceased was going at a very low speed and was on the correct side of the road when the chhakada rickshaw came from the opposite direction at an excessive speed and abruptly the chhakada rickshaw went over to the wrong side and dashed with the motor-cycle dragging the motor-cycle for 10 feet throwing off the two

passengers of the motor-cycle; both the passengers received serious head injuries and were bleeding and died on the spot.

After completion of the examination in chief of this witness also, following endorsement was made by the Tribunal :-

> "Cross-examination: For No.1 absent. For No.2 Advocate Mr.J.K.Thacker, absent."
> For opponent No.3 Mr.R.J.Dholakiya – cross examination was recorded.

Thus this witness was also cross-examined only by learned advocate for the appellant Insurance Company.

8.5. On the same day i.e. 1st March 2000 after evidence of witness No.3 Amir Amadbhai Raja was recorded at Ex.53 (during whose chief, learned advocate for opponent No.2 Mr.J.K.Thacker was absent), the appellant Insurance Company gave another application Ex.54. In this application it was specifically stated that the other opponents were not effectively contesting the claim, that opponent No.2 had appeared but was not participating in the proceedings properly and that the Insurance company had reasonable apprehension that opponent No.2 was not interested in contesting the claim or was colluding with the claimants. It was further stated that opponent No.2 had not filed any written statement and was also not present for cross-examining the witnesses; hence the application of the Insurance Company for permission under section 170 of the Act may be granted. There is no dispute about the fact that the application Ex.54 was filed by the learned advocate for opponent No.3 Insurance Company on 1st March 2000 and on that very day, the Tribunal passed the following order:

> "Fixed for reply and hearing".
>
> 1-3-2000

It appears that no order was passed on the said application till the claim petition was finally decided by the Tribunal by the impugned judgment and award dated 30th July 2001 and the application Ex.54 came to be rejected by a separate order by the Tribunal on the same day on which the judgment and award were pronounced by the Tribunal.

9. In the background of the aforesaid facts, Mr.Mehul Suresh Shah, learned counsel for the respondent-claimants has made the following submissions in support of the preliminary contention :-

9.1 Since permission under section 170 of the Act was not granted by the Tribunal and both the applications of the Insurance Company were rejected, it was not open to the appellant Insurance Company to challenge the award on the question of negligence or on the question of quantum of compensation. Strong reliance is placed on the decision of the Apex Court in **National Insurance Co. Ltd v. Nicolleta Rohtagi**, 2002 ACJ 1950 = (2002) 7 SCC 456 in support of the contention that even if it was the case of the Insurance Company that permission was erroneously rejected by the Tribunal, the insurer can challenge that part of the order only in an appeal filed on the grounds specified in sub-section (2) of section 149 of the Act. It is submitted that since in this appeal the Insurance Company has not invoked any grounds available to the insurer under sub-section (2) of section 149 of the Act, the present appeal challenging the findings on the question of negligence and quantum is not at all maintainable on account of absence of any permission under section 170 of the Act.

9.2 In addition to placing reliance on a Division Bench decision of this Court in **Oriental Insurance Co. Ltd. v.**

Manjulaben Jayantibhai Patel, 2003 (3) G.L.H.204 to which one of us was a party, it is vehemently submitted that another Division Bench of this Court has already taken a view in the order dated 22nd December 2005 in First Appeal No.2107/05 (**New India Assurance Co. Ltd v. Amit @ Mahesh Gopal Harijan)** that order under section 170 of the Act passed by the Tribunal cannot be assailed in an appeal under section 173 of the Act. Order rejecting the application under section 170 of the Act is final since remedy of appeal is against the award and not against the order on application under section 170 of the Act. Therefore, the Act does not provide for a remedy against the order under section 170.

10. On the other hand, Mr.R.H.Mehta, learned counsel for the appellant Insurance Company has submitted that the appellant Insurance Company had no opportunity to challenge the order of rejection of application under section 170 of the Act because soon after the first application at Exh.52 was rejected on 1st March 2000, the third witness was examined on behalf of the claimants and at that time also, the owner or his learned advocate were not present and the cross-examination was done only by learned advocate for the Insurance Company and therefore, immediately after the deposition of the said witness was recorded at Ex.53, another application at Ex.54 was submitted on behalf of the Insurance Company pointing out that opponent No.2, owner of the chhakada rickshaw had not filed any written statement and was also not present for cross-examination of the witnesses of the claimants. It is submitted that since this application Exh.52 remained pending and came to be rejected only on the date of pronouncement of the judgment and award the Insurance Company got the opportunity to challenge the said order only in the present appeal under section 173 of the Act challenging the award.

It is further submitted by Mr.Mehta that the Apex Court has never held that in an appeal under section 173 of the Act, the Insurance Company cannot challenge any erroneous order of the Tribunal rejecting permission under section 170 of the Act.

11. Let us first examine the three Judge Bench decision of the Apex Court in National Insurance Co. Ltd. v. Nicolletta Rohtagi 2002 ACJ 1950 = (2002) 7 SCC 456. The Apex Court traced the legislative history of English law as regards the liability of an insurer in the event of a motor vehicle accident in respect of third party right and held that in order to avoid its liability on the ground that there was breach of the terms and conditions of the policy, the insurer cannot invoke breach of **any** term or condition of the policy but breach of only those terms and conditions which were indicated in sub-section (2) of section 149 of the Act. Breach of any other condition of the policy by the insured which does not find place in sub-section (2) of section 149 of the Act cannot be taken as a defence by the insurer. The Apex Court then made following observations:

> "31. We have already held that unless the conditions precedent specified in section 170 of the 1988 Act are satisfied, an insurance company has no right to appeal to challenge the award on merits. However, in a situation where there is a collusion between the claimants and the insured or the insured does not contest the claim and, further the Tribunal does not implead the insurance company to contest the claim in such cases it is open to an insurer to seek permission of the Tribunal to contest the claim on the grounds available to the insured or to a person against whom a claim has been made. If permission is granted and the insurer is allowed to contest the claim on merits in that case it is open to the insurer to file an appeal against an award on merits, if aggrieved. In any case, <u>where an application for permission is erroneously rejected the insurer can challenge only that part of the order while filing an appeal on grounds specified in sub-section (2) of section 149 of 1988 Act.</u> But such application for permission has to be bona fide and filed at the stage when the insured is required to lead his evidence. So far as obtaining compensation by fraud by the claimant is

> concerned, it is no longer res integra that fraud vitiates the entire proceeding and in such cases it is open to an insurer to apply to the Tribunal for rectification of award."
>
> (emphasis supplied).

19.03.2007

12. Learned counsel for either side laid considerable emphasis on the underlined words in the above quoted paragraph. While Mr.Mehul Suresh Shah for the claimants vehemently submitted that it is only if the Insurance Company has filed an appeal on the grounds specified under sub-section (2) of section 149 of the Act that the Insurance Company can further challenge the rejection of the application for permission under section 170 of the Act in such an appeal, Mr.Mehta for the Insurance Company submitted that all that the Apex Court has held is that the rejection of an application for permission under section 170 need not be challenged at an interlocutory stage, but only after the award is made by the Tribunal in the claim petition.

13. Having examined the relevant provisions of the Motor Vehicles Act, 1988 and having gone through the aforesaid decision of the Apex Court and also other decisions of this Court, we find considerable substance in the submission of Mr.Mehta for the Insurance Company. For the present, leaving aside the case falling under clause (a) (collusion between the claimant and driver/owner of the vehicle involved in the accident), it is clear that the ingredients of clause (b) of section 170 are quite objective in nature. Once the Insurance Company is able to show that driver/owner of the vehicle has failed to contest the claim, permission to the insurer under section 170 of the Act to contest the claim on all or any of the grounds available to driver and owner of the vehicle should be granted. In such a case, it is difficult to appreciate as to how the claimant could possibly oppose the

insurer's application for permission under section 170 of the Act.

14. The facts of the present case, as narrated in para 8 hereinabove are eloquent and leave no room for doubt that driver as well as owner of the vehicle involved in the accident had utterly failed to contest the claim. The driver did not appear even after service of notice of the claim petition. Though the owner did appear by engaging an advocate, there was no effective contest inasmuch as neither written statement was filed nor the witnesses of the claimants were cross-examined. Either the owner's advocate was absent when the claimants' witnesses were being examined or the said advocate simply declined to cross-examine the witnesses. Even then, the Tribunal rejected application Ex.52 on the ground that the vehicle owner had appeared in the claim petition and therefore application Ex.52 for permission under section 170 did not survive.

15. The Tribunal was clearly in error in substituting for all practical purposes the language of sub-section (b) of section 170 of the Act. When the Legislature intended to permit the insurer to contest the claim petition on all grounds when driver/owner of the vehicle failed to contest a claim petition, mere appearance of the owner through an advocate would be of no use. Since ultimately it is the insurer which will be satisfying the award and shelling out compensation from its pocket, it is entitled to expect the vehicle owner as well as driver to contest the claimant's assertions and evidence on the question of negligence and quantum of compensation. When there is no such contest from owner and driver of the vehicle, rejection of the insurer's application under section 170 would either require the insurer to challenge the order by filing a writ petition at the interlocutory stage (which would unnecessarily prolong the claim proceedings) or the insurer must be permitted to challenge the adverse order under section 170 at

least after the final award is made by the Tribunal.

16. Seen in this light, the underlined observations of the Apex Court in **National Insurance Co. Ltd. v. Nicolletta Rohtagi,** 2002 ACJ 1950 would be capable of only one interpretation, namely, where an application for permission is erroneously rejected, the insurer need not challenge that part of the order at an interlocutory stage, but it is while filing an appeal challenging the award that the adverse order under section 170 can be challenged. It is true that words "while filing an appeal on grounds specified in sub-section (2) of section 149 of 1988 Act" may indicate that when permission under section 170 is refused and the final award is made in the claim petition, the insurer may ordinarily file an appeal on grounds specified in sub-section (2) of section 149 of the Act. That, however, cannot mean that if the insurer has not invoked any grounds specified in sub-section (2) of section 149 of the Act, it cannot challenge the refusal of permission under section 170 of the Act because the very scope of application under section 170 is for permission to contest the claim petition on merits i.e. on questions of negligence, quantum of compensation and vicarious liability of the owner. If the insurer is not interested in challenging the award on any of these grounds available to driver/owner of the vehicle, he need not in the first place have filed any application under section 170 of the Act. We are, therefore, not in a position to accept the submission made on behalf of the claimants that an erroneous order rejecting permission under section 170 cannot be challenged unless and until the insurer has raised at least some grounds specified in sub-section (2) of section 149 of the Act in the appeal.

In other words, if the insurer's application under section 170 of the Act is rejected by the Tribunal, it would be open for the insurer to question the legality of such an order while filing an

appeal against the final judgment and award. If the challenge is upheld by the higher court, the scope of appeal filed by the Insurance Company challenging the judgment and award of the Tribunal would stand enlarged and it would be open for the insurer to press in service all defences available. On the other hand, if the appellate court were to uphold the order of the Tribunal rejecting the application under section 170 of the Act, the appeal of the insurer shall have to be confined only to the statutory defences which the insurer can raise under sub-section (2) of section 149 of the Act.

17. As regards reliance placed by the learned advocate for the claimants on the order dated 22.12.2005 of a Division Bench of this Court taking a view that remedy of appeal lies against the award and not against the order on application under section 170 of the Act, we would like to observe that when section 173(1) of the Act confers right of appeal on any person aggrieved by an award of the Claims Tribunal, aggrieved person also has a right to simultaneously challenge the interlocutory orders passed by the Claims Tribunal. Suppose the Tribunal had passed order refusing to grant permission to the insurer under section 170 of the Act, but ultimately after considering the evidence on record, if the Tribunal were to come to the conclusion that the claimants had failed to prove negligence of the opponent driver or that the claimed had failed to prove any loss of income, there would no occasion for the insurer to challenge such an award casting no liability on the Insurance Company. Even in a case where the Tribunal were to give findings in favour of the claimants on the question of negligence and quantum of compensation, but if any of the defences invoked under sub-section (2) of section 149 of the Act were to be upheld, then also there would be no occasion for the insurer to challenge the final award. As per the settled legal position, whenever a right of appeal is conferred by the statute to

challenge the final decision in any proceedings, it also includes the right to challenge any interlocutory order, the only exceptions being proceedings such as suit for partition or suit relating to mortgage where the relevant statutory provisions require the Court to pass a preliminary decree first and then a final decree. If the preliminary decree is not challenged and the court proceeds to draw a final decree, in an appeal against the final decree the appellant would be precluded from challenging the preliminary decree. Subject to this well-known exception, a person aggrieved by the final decision or award cannot be precluded from challenging any interlocutory order. This Legislative thrust is also evident from the recent amendments of the Code of Civil Procedure severely restricting the right of revision under section 115 of the Code of Civil Procedure.

18. At this stage, Mr.Mehul Suresh Shah for the claimants would submit that it would not be open for us to take a view different from the view taken by another Division Bench of this Court without having the matter referred to a Larger Bench. Strong reliance has been placed on the decision of the Apex Court in **Somabhai Mathurbhai v. New Shorrock Mills**, 1983 G.L.H. 273 in support of the contention that even if the previous Bench had not considered the judgment of the Apex Court having an impact on the point under examination, it is not open to reject the ratio of the decision. Having carefully considered the above submission, it is not possible to accept the same. The decision of the Apex Court in National Insurance Co. Ltd. v. Nicolletta Rohtagi's case was not a mere decision having an impact on the question of maintainability of the appeal challenging the order of refusal under section 170 of the Act. In fact, the Apex Court had already decided that question in Nicolletta Rohtagi's case. The Apex Court has clearly held in Nicolletta Rohtagi's case that an erroneous refusal of permission under section 170 can be

challenged in an appeal filed by the insurer. Unfortunately this decision of the Apex Court was not pointed out to the Division Bench. The decision in case of **New India Assurance Co. Ltd v. Amit @ Mahesh Gopal Harijan** dated 22.12.2005 of a Division Bench taking a view that the Act does not provide remedy against order under section 170 passed during the proceedings before the Tribunal therefore must be held to be *per incurium*. It also appears that the Division Bench placed reliance on a decision of Full Bench of the Madhya Pradesh High Court in **New India Assurance Company Ltd. Bhopal v. Smt. Rafeeka Sultana**, AIR 2001 M.P.116 = 2001 ACJ 648.

19. We find that the said decision was rendered on 26.9.2000, therefore, obviously before Nicolletta Rohtagi's case was decided by the Apex Court on 17.9.2002. A closer look at the decision in the case of New India Assurance Company Ltd. Bhopal v. Smt. Rafeeka Sultana (supra) would reveal that the point at reference in the said decision was whether the Insurance Company can challenge the award in a revision application under section 115 of the Code of Civil Procedure or in a petition under Article 227 of the Constitution. The Full Bench opined that when the Insurance Company cannot file an appeal (questioning quantum of compensation) it cannot challenge the decision of the Tribunal either by way of revision application under section 115 of the Code of Civil Procedure or in a petition under Article 227 of the Constitution. The Full Bench also opined that when permission under section 170 of the Act is not obtained by the Insurance Company from the Tribunal, its defences are restricted to those mentioned in sub-section (2) of section 149 of the Act and such a restriction is not limited only to the trial stage but would also apply in appeal. In fact, the contention of the insurer before the Court appeared to be that even if no permission under section 170 of the Act is obtained by the insurer from the Tribunal, restriction of

defences that the Insurance Company can raise would apply only at the trial stage and once the Tribunal passes its final judgment and award, it would be open for the insurer to challenge the award on all grounds ignoring the restrictions contained in sub-section (2) of section 149 of the Act. Thus the issue before the Full Bench was not whether order passed by the Claims Tribunal rejecting the application of the insurer under section 170 of the Act can be challenged while preferring an appeal against the final judgment and award passed by the Tribunal. Hence the Division Bench decision dated 22.12.2005 based on the Full Bench decision of the Madhya Pradesh High Court dated 26.9.2000, without taking into consideration the law laid down by the Apex Court in Nicolletta Rohtagi's case decided on 17.9.2002 must be held to be *per incurium.*

In view of the above discussion, we are of the view that while order erroneously refusing permission to the insurer under section 170 of the Act is capable of being challenged by filing a writ petition at an interlocutory stage or by challenging the same in an appeal against the final award made by the Claims Tribunal, not challenging the order under section 170 of the Act at an interlocutory stage cannot and does not deprive the insurer of its right to challenge such an order in an appeal under section 173 of the Act against the final award made by the Claims Tribunal.

20. We may now deal with the decision rendered by another Division Bench of this Court to which one of us was a party in the case of **Oriental Insurance Co. Ltd v. Manjulaben Jayantibhai Patel**, 2003 (3) G.L.H. 204. It was, of course, rendered after considering the Apex Court's decision in Nicolletta Rohtagi's case. The decision is capable of being read as laying down the legal position in very wide terms that an appeal against the award on the grounds of negligence and quantum of compensation would not

be maintainable if the Tribunal had not granted permission to the insurer under section 170 of the Act. However, the submissions made by the learned advocate for the Insurance Company in that case need to be closely read. What the Insurance Company had invoked in that case was an argument based on implied permission and had not contended that an erroneous refusal of permission under section 170 of the Act cannot be challenged in an appeal against the final award. It was a case where the Insurance Company had not made any application for permission under section 170 of the Act and therefore, the Tribunal had not passed any order under section 170 of the Act. Therefore, the Insurance Company had merely invoked the ground of implied permission. The decision is to be read as deciding the controversy raised in that particular case. The Court decisions interpret the statutes and the decisions are not to be interpreted as statutes.

21. In view of the above discussion, we are clearly of the view that the Tribunal committed a serious error in rejecting the application for permission under section 170 of the Act to contest the claim petition on all grounds available to the driver/owner of the vehicle and that in an appeal against the final award of the Claims Tribunal, it is open to the insurer to challenge all the interlocutory orders including the order refusing permission under section 170 of the Act.

22. Having been confronted with this view which we indicated to the learned counsel for the claimants at the hearing, it was vehemently submitted by Mr.Mehul Shah for the claimants that when the first application (Ex.52) of the insurer for permission under section 170 of the Act was rejected, second application on the same ground was not maintainable. The Tribunal was, therefore, justified in rejecting the second application (Ex.54) on the ground that the first application was already rejected and that

the order thereon had become final.

23. The submission overlooks the express provisions of section 170 of the Act which open with words “where in the course of any inquiry ....” The Legislature has not provided any particular stage for the insurer to make an application for permission under section 170 of the Act. The Apex Court has held that such application has to be filed at the stage when the insurer is required to lead his evidence i.e. after the evidence of the claimants is over and also the evidence of the driver/owner of the vehicle is over. The question whether there is collusion between the claimant and driver/owner of the vehicle or whether driver/owner of the vehicle has failed to contest the claim is capable of being raised right till the last witness of the claimants is examined and even till the last witness of the driver/owner is examined. Driver/owner may initially contest the claim by filing a written statement and by cross-examining one witness and may thereafter fail to cross-examine the other witnesses more particularly on the question of negligence and quantum of compensation. It is, therefore, not possible to hold that merely because the insurer's application made at one stage was rejected by the Tribunal, second application was not maintainable.

24. Facts of this very case clearly show that when the first witness of the claimant was examined, the advocate for the owner offered no cross and when the second witness was examined, the advocate for the owner was absent. Hence the insurer made application Ex.52 for permission under section 170 which erroneously came to be rejected on the ground that the application did not survive because the owner had appeared in the proceedings. On that very day i.e. 1st March 2000, after rejection of the said application Ex.52, third witness for the claimants was examined and the advocate for the owner was absent. It is thus

clear that the owner failed to contest the proceedings even after application Ex.52 was rejected. Both on interpretation of the statutory provisions and also in the facts of the present case, we have no hesitation in holding that application Ex.54 was very much maintainable notwithstanding the rejection of application Ex.52.

25. We are also disturbed to note that although application Ex.54 was filed on 1st March 2000, the Tribunal did not decide the same till the award came to be made on 30th July 2001. The appellant Insurance Company, therefore, had no occasion to challenge the order rejecting the application Ex.54 any time before filing the appeal against the final judgment and award dated 30th July 2001.

26. Having thus cleared the ground on the question of preliminary objection raised on behalf of the claimants regarding maintainability of the appeal, we now proceed to deal with the submissions of the learned counsel for the appellant Insurance Company on merits.

27. As regards the Tribunal's finding on the question of negligence, Mr.Mehta submitted that the Tribunal erred in holding driver of the chhakda rickshaw solely negligent in causing the accident. He submitted that the accident occurred on a curve and therefore, at least driver of the motor-cycle was required to slow down his vehicle. He submitted that therefore the Tribunal could have held the motor-cycle driver at least partially responsible for causing the accident.

28. With respect to the question of negligence, the Tribunal while coming to the conclusion that the driver of the chhakda rickshaw was solely negligent took into account the deposition of an eye-witness Amirbhai Amadbhai Raja recorded at Ex.53. The

Tribunal also noted the contents of panchnama (Ex.39) of scene of the accident. According to the eye-witness, he was present when the accident took place. He stated before the Tribunal that two motor-cyclists were proceeding from Samkhyali at slow speed and on the left side of the road and at that time, chhakda rickshaw came from Bhachau side i.e. opposite side. The rickshaw was being driven at a high speed. Despite a curve on the road, the rickshaw was not slowed down, as a result of which the rickshaw collided with the motor-cycle and dragged the vehicle to about 10 feet. Both persons sitting on the motor-cycle fell down and were bleeding profusely. Both died on the spot. At that time, a car belonging to the Forest Department passed by. The witness gave the details of the accident upon which they informed the authorities by wireless. He gave his name and address to those people who had thereafter proceeded to file a complaint before the police. A few days thereafter, the police had taken his statement. In the panchnama also, it is noted that the chhakda rickshaw was found on the middle of the road and had travelled on the wrong side. Secondly, the Insurance Company made no attempt to examine the driver of the chhakda rickshaw to throw light on the question of negligence.

Having heard the learned advocates for the parties and having perused the evidence on record, we have no hesitation in upholding the conclusion of the Tribunal regarding the question of negligence. As noted earlier, there was clear eye-witness account narrating the manner in which the accident took place. Nothing substantial has come out from the cross-examination of this witness. The panchnama supports the version of the eye-witness. The original opponents made no attempt to examine the driver of the offending vehicle to dislodge the evidence led by the claimants. Considering all these aspects of the matter, we confirm the finding of the Tribunal that the accident in question was occasioned by the

sole negligence of driver of the chhakda rickshaw insured by the appellant Insurance Company.

29. Coming to the question of quantum of compensation, we are shocked to notice the method adopted by the Tribunal for determining the prospective income of the deceased. Admittedly, the accident took place on 18th March 1992 and in February 1992, the monthly income of the deceased was Rs.2858/- as evidenced from the salary slip. The prospective income of Rs.11,157/- per month assessed by the Tribunal is surely mind-boggling. The Tribunal, in fact, put the cart before the horse by first deciding the multiplier of 18 years on the basis of the age of the deceased being 28 years. The Tribunal then ascertained as to what would have been the monthly income of the deceased 18 years after the date of the accident. While there could be no objection for taking into consideration the statutory pay revision which had taken place during the intervening period, the prospective income to be taken as the datum figure for assessment of compensation could not have been of the 18th year from the date of the accident i.e. 2010. We find that the award was rendered in July 2001 on the basis of the evidence recorded in the year 2000. The Officer of the Forest Department had produced a statement indicating the basic salary and allowances which the deceased would have got had he remained alive and continued in employment. Adoption of salary figure of the year 2010 and multiplying the same by 18 years has resulted into the claimants being over-compensated to such an extent that even for the period between 1992 and 1996, as against the monthly salary of Rs.2800 to Rs.3200, compensation for loss of dependency benefit has been assessed on the basis of monthly income of Rs.11,000/- approximately. Similarly, even for the subsequent period commencing from 1.1.96 when the pay revision was given effect, the monthly salary of the deceased would have been much less than Rs.11,000/-. The Tribunal thus committed a

fundamental error in assessing the prospective income of the deceased at Rs.11,157/-. We may also note that the said witness in his cross-examination admitted that the computation of probable income of the deceased was worked out on the basis of revised pay-scales pursuant to 1996 pay revision and that while calculating the pay of the deceased, benefit of higher grade scale was also taken into account. He also admitted that in the statement of income, deduction for income tax was not provided.

30. In the facts and circumstances of the case and particularly considering the fact that the accident in question took place in the year 1992 and the evidence was recorded 8 years thereafter in the year 2000, during which period the pay-scale for the concerned post was substantially revised upwards and the award was rendered in 2001 we are of the view that the income which the deceased would have received in the year 2001 would be the appropriate amount to be taken as the prospective income of the deceased for two reasons. In the first place, for the entire period between 1992 and 2001, the deceased would have actually received less salary than what he would have received after 2001 had he remained alive and secondly even on the compensation for loss of dependency benefit for the entire period from the date of the claim petition (1992) till the date of the award, the Claims Tribunal and this Court would award interest. Ninth year would otherwise also be the mean year for 18 year period which was the remaining span of his total service.

31. In totality of the facts and circumstances of the case, therefore, we are of the view that it would be just and proper to assess and compute the compensation for loss of dependency benefit to the family of the deceased on the basis of the income of the deceased which the deceased would have earned in the year 2001 had he remained alive. From the evidence of Ramchandra

Ishwarlal Bhamar at Ex.58, an officer of the Forest Department and the statement produced by the said witness, it is clear that in the year 2001, the deceased would have got Rs.8,000/- p.m. approximately. We, therefore, assess the prospective income of the deceased for the purpose of computation of compensation for loss of dependency benefit at Rs.8,000/- per month. Deducting one-third amount therefrom as the personal expenses of the deceased, the dependency benefit comes to Rs.5300/- per month i.e. Rs.63,600/- per annum. Since the deceased was aged 28 years on the date of the accident, multiplier of 17 years will be appropriate. Accordingly, compensation for loss of dependency benefit would be Rs.63,600 x 17 = Rs.10,81,200/- rounded off to Rs.10,81,000/-. Adding thereto Rs.25,000/- for loss to the estate, Rs.15,000/- for loss of consortium to the widow of the deceased and Rs.5,000/- for funeral expenses, the total compensation works out to Rs.11,26,200/- (rounded off to Rs.11,26,000/-).

As regards the rate of interest, the Tribunal has awarded interest at the rate of 9 per cent per annum from the date of claim petition till date of deposit of the amount. In view of the decision of the Apex Court in **Tejinder Singh Gujral v. Inderjit Singh,** (2007) 1 SCC 508, we see no reason to vary the rate of interest.

32. In the result, the appeal is partly allowed. The amount of compensation is reduced from Rs.18,00,000/- to Rs.11,26,000/- with interest at the rate of 9 per cent per annum from the date of claim petition till deposit and proportionate costs. The differential amount deposited by the Insurance Company in compliance with the order dated 11th February 2002 of this Court in Civil Application No.1048 of 2002 shall be refunded to the Insurance Company by account payee cheque.

It is brought to our notice that by the aforesaid order, this Court had also directed the Claims Tribunal to withdraw Rs.8 lacs and balance amount of Rs.24,88,321/- was invested in fixed deposits with a nationalized bank and the interest periodically accruing thereon was also permitted to be withdrawn by the claimants on furnishing security to the satisfaction of the Tribunal. In view of the reduction of amount of compensation with proportionate costs and interest thereon, the differential amount shall be refunded to the Insurance Company out of the above fixed deposits within two months from the date of receipt of writ of this Court.

33. In view of the above findings, the Cross Objections fail and are dismissed with no order as to costs.

(M.S.Shah, J.)

(Akil Kureshi, J.)

(vjn)